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SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM, 194...

Nos.

244

LIONEL G. OTT, Commissioner of Public Finance and Ex-Officio City Treasurer, etc.,
Appellant, vs. MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee.

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant, vs. MISSISSIPPI VALLEY
BARGE LINE COMPANY, Appellee.

LIONEL G. OTT, Commissioner of Public Finance and Ex-Officio City Treasurer, etc.,
Appellant, vs. AMERICAN BARGE LINE COMPANY, Appellee.

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BARGE LINE COMPANY, Appellee.

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant, vs. AMERICAN BARGE
LINE COMPANY, Appellee.

(CONSOLIDATED)

Appeal from the United States Circuit Court of Appeals for the
Fifth Circuit.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF
APPELLEES TO DISMISS OR AFFIRM.

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MAY IT PLEASE THE COURT:

Appellants take serious issue with the statement of appellees herein that the questions raised by this appeal lack substance, and on the contrary, appellants show that they are entitled to an appeal as a matter of right, in the serious and important questions raised here, as the very life of a Louisiana Statute is at stake!

Appellants invoke the jurisdiction of this Court under Section 240 of the Judicial Code, as amended, (28 U. S. C. A. Section 347) reading in part as follows:

(b) "Any case in a circuit court of appeals where is drawn in question the validity of a **Statute of any State**, on the ground of its being **repugnant** to the **Constitution**, treaties or laws of the United States, and the **decision is against its validity**, may at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case." (Emphasis supplied.)

Appellants show that the question presented herein falls squarely within the foregoing quoted provisions and calls for an appeal as a matter of right.

The three appellee Companies herein, in their complaints, attacked the constitutionality of the Louisiana Statute (Act 59 of 1944) under which the taxes on this watercraft were imposed, as being in violation of the provisions of the Constitution of the United States. The United States District Court in its conclusions of law held:

"The continued retention of any of the aforementioned illegal taxes, paid under protest by the respective parties in interest, constitutes a taking of property without due process of law, in violation of the Federal and State Constitutions."

The taxes of course were levied under the provisions of the Louisiana Statute, giving the State of Louisiana the right to taxes on this watercraft, and this holding by the United States District Court expressly sets forth that the Statute is repugnant to the Constitution of the United States.

These cases were all consolidated for trial in both the District Court and the United States Circuit Court of Appeals, the Court of Appeals affirming the decision of the District Court, as to the three appellees herein, when in the conclusion of its opinion the Court states: "The judgments appealed from are affirmed in all these causes"

Thus, it is inescapable that the Circuit Court of Appeals, in effect, held with the District Court that the provisions of the Louisiana Statute are repugnant to the Constitution of the United States; the decision being **against the validity of the State Statute.**

It is self-evident, therefore, that these nine cases come clearly within the provisions of paragraph "(b)" of Section 240 of the Judicial Code, as amended (28 U. S. C. A. Section 347) (*supra*).

Obviously, then, appellants are entitled to an appeal herein as a matter of right.

Appellants have no quarrel with the statement of appellees that a decision of a Circuit Court of Appeals merely applying a State law is not reviewable by appeal to the Supreme Court, nor with the cases cited in support thereof. We believe this principle of law to be well settled, but to have absolutely no application here. Had

the Circuit Court of Appeals **applied** the State law here, it would have resulted in **judgment** for the **appellants** instead of the appellees; instead the Circuit Court of Appeals, in effect, held the State Statute repugnant to the Constitution of the United States. The statute in question (Act 59 of 1944 of the Legislature of Louisiana) specifically sets forth that interstate carriers, such as appellees herein, who run their lines within Louisiana, shall be assessed on a proportionate mileage basis, Section 5, Paragraph "g" of said Statute reading as follows:

(g) . "For the purposes of such valuation, assessment and taxation in Louisiana, such parishes and municipalities shall be hereby fixed and declared, respectively, **to be a taxable situs in this state** of such movable personal property, whether same be operated entirely within or partly within and partly without this state and whether said tax-payer be a **resident or a non-resident** of Louisiana and **irrespective of whether or not here domiciled locally or otherwise.**" (Emphasis supplied.)

Thus, it is clearly seen, that had the Circuit Court of Appeals applied the State Statute they would have necessarily found for appellants herein; they could not have done otherwise. It will be noted that there is no provision whatsoever in the Statute in question which allows for a Court to first **find** that the barges and tow-boats have a taxing situs in Louisiana. If such a condition precedent had been contained in the Statute, then appellees' position here may have been on a more sound basis. The Statute unequivocally **fixes** the taxing situs in Louisiana for the portion of the property sought to be taxed, whether the said tax payer be a resident or a

non-resident of Louisiana and irrespective of here domiciled locally or otherwise.

The three appellee corporations herein are domiciled in other States than Louisiana and it is such corporations the Statute is intended to cover. Obviously, Louisiana needed no special Statute, as this one, to cover watercraft found to have a taxing situs in the State, as such equipment could be taxed under the general taxing laws of the State, the same as domestic property.

This Statute fixes the situs in Louisiana of a portion of appellees' property. To therefore hold that this property has no taxing situs in Louisiana is to deny the validity of the Statute!

It is admitted that these private barge-lines run continually and constantly throughout the year in Louisiana, and they clearly come within the provisions of this Statute; to hold that Louisiana cannot collect these taxes is to decide against the validity of a State Statute. This is so apparent from the reading of the Statute, and the provisions of the Judicial Code giving this Court jurisdiction, that it should admit of no further argument.

It is true that the Circuit Court of Appeals went beyond the provisions of the Statute and, contrary to the provisions of the Statute, attempted to find that this watercraft equipment had no taxing situs in Louisiana, in spite of the fact that the Statute clearly fixes a taxing situs in Louisiana for a proportion of this watercraft. The Circuit Court of Appeals clearly abrogated the provisions of the Statute and necessarily and inescapably held against its validity.

These decisions therefore give appellants a clear right of appeal under the law.

There are so many other similar, untried pending cases awaiting a final decision herein, involving many, many thousands of dollars, that such a serious Federal question calls for decision by the highest Court of our land, and which compels appellants to apply for this appeal, under the law.

It is therefore respectfully urged that appellees' motion to dismiss or affirm be denied, and that the appeal be set for hearing on the merits.

Respectfully submitted,

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This is to certify that copies of this Brief have been served on opposing counsel on this the day of August, 1948.

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